IN THE

Supreme Court of the United States

October Term, 1939

No. 380

ALFRED A. MAURER and MARCUS W. MYERS, Trading as MAURER & MYERS AUTO CONVOY,
Appellants,

v.

WILLIAM J. HAMILTON, Jr., Secretary of Revenue of the Commonwealth of Pennsylvania, et al.

BRIEF FOR APPELLANTS

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The opinion of the Court of Common Pleas of Dauphin County is reported in 45 Dauphin County Reporter 341; the opinion of the Pennsylvania Supreme Court is reported in 336 Pa. 17.

STATEMENT OF GROUNDS OF JURISDICTION

Appellants contend that a right of appeal in this proceeding is conferred by Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 344). In their statement as to jurisdiction heretofore printed and filed with the court, they have set forth in detail the facts pertaining to the jurisdiction of this court on appeal and the authorities sustaining jurisdiction. The appellants respectfully request that said statement as to jurisdiction be incorporated in this brief by reference thereto.

STATEMENT OF THE CASE

On the twenty-ninth day of June, 1937, the Governor of the Commonwealth of Pennsylvania approved Act No. 447 (1937 P. L. 2329), 75 PS 2, etc., covering a large number of amendments to The Vehicle Code. Included was a new section designated "Section 1033," (75 PS 642), which, except for the penalty clause, reads as follows:

"Section 1033. (a) No person shall operate a vehicle on the highways of this Commonwealth having two levels for the carriage of other vehicles.

"(b) No person shall operate a vehicle on the highways of this Commonwealth carrying other vehicles, any part of which is carried at a height of more than one hundred and fifteen (115) inches above the ground.

"(c) *No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle.* (Italics supplied)

"(d) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any axle of which is more than three (3) feet higher than any other axle on such carrier vehicle."

Subsection (c) is set forth in italics since it is the only provision involved in this appeal.

Section 21, subsections (c) and (d) of the act, (75 PS 2 note) read as follows:

"(c) The amendments to section 1033, subsections (a), (b) and (d) shall become effective on January first, one thousand nine hundred and forty.

"(d) All of the other provisions of this act shall become effective immediately upon the approval of this act by the Governor."

The code provides that its various provisions are severable (75 PS 5, note):

"Section 20. Constitutional Construction. — The provisions of this act are severable, and if any provision thereof is held to be unconstitutional, the decision so holding shall not be construed as affecting or impairing any other provision of this act or the act as a whole. It is hereby declared as the legislative intent that this act would have been adopted had such unconstitutional provision not been included therein."

The same Legislature also re-enacted, with some changes, Section 102 of The Vehicle Code (75 PS 2) covering definitions. Among these is found the following:

"Section 102 . . . 'Vehicle.'—Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting tractors, agricultural machinery, devices moved by human power or used exclusively upon stationary rails or tracks: . . ."

After Section 1033, subsection (c), had become effective by the terms of the act and certain arrests had been made for violation thereof, Alfred A. Maurer and Marcus W. Myers, trading as Maurer & Myers Auto Convoy, filed a bill in equity (R. 3) in the Court of Common Pleas of Dauphin County, Pennsylvania, seeking to restrain J. Griffith Boardman, then Secretary of Revenue of the Commonwealth of Pennsylvania, P. W. Foote then

Commissioner of the Pennsylvania Motor Police, and Charles J. Margiotti, then Attorney General of the Commonwealth of Pennsylvania, from the enforcement of Section 1033 (c) thereof as against them, on the ground that the section is unconstitutional. The M. & G. Convoy, Inc., a New York corporation, with its principal place of business at Buffalo, New York, thereafter filed a similar bill which was followed by the filing of a bill by John G. Reeser, a resident of Pennsylvania, against the same defendants. A large number of operators were thereafter permitted to intervene.

Among the grounds of unconstitutionality set up by the plaintiffs are the contentions that the state has no right to legislate on this subject insofar as interstate commerce is concerned; that the law constitutes an unreasonable and invalid burden on interstate commerce and that it deprives the plaintiffs of their property without due process of law and without just compensation therefor in violation of the provisions of the Fourteenth Amendment of the Federal Constitution.

All the plaintiffs and intervenors are engaged in the business of transporting new automobiles by motor vehicle as common or contract carriers utilizing tractor-trailer units. This type of transportation involves carrying a part of an automobile over the cab of the carrying vehicle and is often referred to as car-over-cab operations. They all operate practically entirely in interstate commerce (R. 36, 37, 49, 86, 91, 92, 96, 111, 115, 157-161, 155, 199, 207, 209).

Upon presentation of the bills accompanied by supporting affidavits, preliminary injunctions were granted without hearing contingent upon the filing of proper bonds. The bonds were filed and a hearing was held on the motion to continue the preliminary injunctions. Following the hearing, the preliminary injunctions were continued and

the matters came on for final hearing on November 8, 1937. This hearing was continued on various dates until concluded on the thirty-first day of December, 1937.

The Commonwealth agreed that the three cases (one involving a foreign corporation, one a Pennsylvania individual, and one a Pennsylvania partnership) were typical and its attitude toward enforcement against all operators would be governed by the decrees and judgments entered in these cases. The three cases were consolidated for the purpose of hearing.

The testimony produced at the hearings indicates that the plaintiffs have equipment worth hundreds of thousands of dollars (R. 39, 84, 92, 171) which would, if the provisions of this Section 1033 (c) are upheld, be completely outlawed (R. 40, 171).

After requests for findings of fact and conclusions of law had been submitted, the Dauphin County court, on April 27, 1938, per Wickersham, A. L. J., filed an opinion (R. 479) and entered a decree nisi dissolving the preliminary injunction and dismissing the bill of complaint.

The said court concluded, inter alia, that the right of the state to enforce said statute against interstate commerce was not superseded by any act of Congress then in effect or by the regulations prescribed and investigations conducted and reports filed by the Interstate Commerce Commission; that the act did not constitute an unreasonable or invalid burden on interstate commerce and that it did not deprive the plaintiffs of their property without due process but, on the contrary, is a valid exercise of the police power of the Commonwealth.

Exceptions (R. 499) were duly filed by the plaintiffs and, following argument thereon, were dismissed on September 6, 1938 (R. 523).

An appeal was thereupon taken to the Pennsylvania Supreme Court in the Maurer and Myers case and the parties stipulated that all orders, judgments and decrees entered in that appeal should be applicable to the other cases.

On December 23, 1936, before these proceedings were instituted, the Interstate Commerce Commission prescribed, at Docket *Ex Parte* MC-4 (1 MCC 1), extensive safety regulations pertaining to all interstate motor carriers. These were issued under authority vested in the Interstate Commerce Commission by Section 204 (a) (1) (2) of the Motor Carrier Act, 1935. Subsequently, and while this case was pending, the Commission reopened its proceedings at the same docket number for the express purpose of determining whether or not there was need for additional safety regulations pertaining to car-over-cab operations. The order reopening this matter recites the following reasons therefor:

> "*It is ordered*, That this proceeding be, and it is hereby, reopened solely for the purpose of investigating the safety of operation of motor vehicles used in the transportation of automobiles, which motor vehicles are so constructed that all or part of one of the automobiles being transported protrudes over the cab, and of prescribing reasonable rules and regulations governing the operation of such motor vehicles." (R. 662)

The context of the general safety regulations, the nature and scope of the investigation of car-over-cab service, the resulting orders and reports and the effect thereof are fully discussed in our argument. It should be noted here, however, that on December 5, 1938, while the appeal to the Pennsylvania Supreme Court was pending and before the argument, the Examiner of the Interstate Commerce

Commission filed a report (R. 671) concluding that there was no need for further safety regulations pertaining to equipment so constructed that all or part of one of the automobiles being transported protrudes over the cab of the tractor unit in addition to the safety regulations then in effect by the Interstate Commerce Commission. Subsequently, on March 11, 1939, the Commission filed an exhaustive report reaching the same conclusion (12 MCC 127), (Jurisdictional Statement, p. 40).

The appellants filed a petition (R.656) with the Pennsylvania Supreme Court for remission of the record to the Dauphin County Court "for the purpose of reopening the same to permit the introduction of evidence of the action or actions taken by the Interstate Commerce Commission, or its agents . . ." On January 3, 1939, the court entered an order (R. 678) refusing the petition to remit but providing that "the petition to reopen the hearing before the Interstate Commerce Commission and the report of the examiner may be used by appellants at argument if they deem it material."

The reports of the examiner and the Commission were printed in the appellants' brief and the effect thereof was fully briefed and argued by both sides.

After the appeal had been argued, the General Assembly amended Section 1033 of The Vehicle Code in several particulars. Subsection (c) was amended to read as follows:

> "(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle [any part] *the weight* of which is *directly* above the cab of the carrier vehicle or *directly* over the head of the operator of such carrier vehicle."
>
> (Brackets indicate deletions; italics indicate insertions.)

There being no effective date prescribed in this amendment, under the Pennsylvania law, it did not become effective until September 1, 1939. Statutory Construction Act of May 28, 1937, P. L. 1019, Art. I, Sec. 4 (46 PS 504).

On July 3, 1939, the Pennsylvania Supreme Court filed an opinion (R. 679) affirming the decree of the court below and placing the costs on the appellants.

The court held that neither Congress, by the enactment of the Motor Carrier Act of 1935, nor the Interstate Commerce Commission, by its orders, investigations, reports, rules, and regulations, made in pursuance of the powers conferred upon it by said act, had superseded the right of the state to apply the act to interstate commerce; that the act does not deprive the appellants of their property without due process nor does it impose an invalid and unreasonable burden on interstate commerce. Despite the drastic changes in the 1939 amendment, the court nevertheless held that the amendment did not in any way change the effect of the section. These conclusions of the court are discussed in our argument in a subsequent portion of this brief.

In the meantime, there had been a change of administration in the Pennsylvania state government and all of the original defendants had either resigned or had been removed from office. In accordance with the Pennsylvania practice, a petition was presented to the Pennsylvania Supreme Court on July 15, 1939, praying for leave to substitute the present holders of the respective offices as the defendants and to amend the caption of the case accordingly. No objection was interposed by the Commonwealth and the court approved the petition and allowed the substitution and amendments by order dated July 18, 1939 (R. 654).

An application for allowance of an appeal to the United States Supreme Court was presented to the Chief Justice of the Pennsylvania Supreme Court on July 15, 1939. On July 21, 1939, he refused the said petition (R. 654) and the application was subsequently presented to Mr. Justice Roberts on August 16, 1939, together with a petition for an injunction pending the appeal. On August 17, 1939, Mr. Justice Roberts, after hearing counsel for the parties, entered orders allowing the appeal and awarding an injunction, conditioned on the entering of a $5,000 bond, which was promptly submitted, approved, and filed (R. 655).

The appellees did not file any statement contesting the jurisdiction of the court, and on November 6, 1939, the court ordered "that further consideration of the question of the jurisdiction of this court in this case is postponed to the hearing of the case on the merits."

In the jurisdictional statement heretofore printed and filed by the appellants, the question of jurisdiction was discussed in detail and the applicable authorities were set forth. We therefore do not discuss the question of jurisdiction in this brief. In addition to the authorities cited in the previous statement, appellants submit that discussion of the legal questions covered in this brief establish that there is a substantial Federal question involved in this appeal.

SPECIFICATION OF ERRORS

1. The Pennsylvania Supreme Court erred in holding that the enactment by Congress of the Motor Carrier Act, 1935 (49 USCA 304) and the actions taken, regulations and orders adopted, investigations made and reports filed by the Interstate Commerce Commission in pursuance thereof, did not supersede the provisions of Section 1033 (c) of the Act of June 29, 1937, P. L. 2329, Act No. 447 of the General Assembly of the Commonwealth of Pennsylvania, as originally enacted and as amended by the Act of June 27, 1939 (Act No. 400), insofar as the operation of motor vehicles engaged in interstate commerce is concerned.

2. The Pennsylvania Supreme Court erred in holding that the said Pennsylvania statute, as originally enacted, and as amended by the Act of June 27, 1939 (Act No. 400), is not an unreasonable and invalid burden on interstate commerce.

3. The Pennsylvania Supreme Court erred in holding that the provisions of said Section 1033 (c) of the said statute of the General Assembly of the Commonwealth of Pennsylvania, as originally enacted, and as amended by the Act of June 27, 1939 (Act No. 400), do not deprive the appellants of their property without due process of law in violation of the provisions of Section 1 of Article XIV of the Constitution of the United States.

4. The Pennsylvania Supreme Court erred in concluding that the 1939 amendment to said Section 1033 (c) did not make any change whatever in the effect of the section.

ARGUMENT

I.

SECTION 1033 (c) OF THE STATUTE IS UNCONSTITUTIONAL SINCE THE RIGHT OF A STATE TO PRESCRIBE SUCH RESTRICTIONS AND PROHIBITIONS AS TO INTERSTATE COMMERCE WAS SUPERSEDED BY THE PASSAGE BY CONGRESS OF THE MOTOR CARRIER ACT AND BY THE ACTIONS OF THE INTERSTATE COMMERCE COMMISSION IN PURSUANCE OF THE POWER GRANTED THEREUNDER

The United States Supreme Court has held in many cases hereinafter cited that the federal constitution vests in Congress the ultimate power and control over interstate commerce. At the same time, it has been recognized that as to certain phases of interstate commerce the states may legislate in the absence of action by Congress over that particular subject matter. However, any action by Congress or its agents on any phase of interstate commerce supersedes any state statutes thereon whether the state action is in conflict with the federal action or whether there is substantial coincidence between the two.

Inasmuch as all of the plaintiffs in the companion cases are under the jurisdiction of the Interstate Commerce Commission and operate almost exclusively in interstate commerce (R. 36, 37, 49, 86, 91, 92, 96, 111, 115, 157-161, 155, 199, 207, 209), it becomes relevant to consider whether Congress has seen fit to act on the subject now before your Honorable Court, i. e., the operation and safety of a vehicle carrying a portion of an automobile or of its weight over the cab of the transporting vehicle or the head of its operator.

Almost two years before Section 1033 (c) of the Pennsylvania Vehicle Code was originally enacted, Congress passed the Motor Carrier Act, approved August 9, 1935, to become effective October 1, 1935.

In its effect on interstate transportation, this is one of the most important laws ever enacted by Congress. The tremendous volume of interstate transportation by motor truck, the essential service to the public, the number of persons employed in the industry, the large investment in facilities and equipment are not fully realized by those not in close contact with the situation. Congress was so impressed by these factors that it set up in section 202 (a) a "declaration of policy" which it intended to be a general guide as to the purpose of the law. It is necessary to keep this declaration constantly in mind in determining the intent of Congress in enacting this legislation. It reads as follows:

"Sec. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; *develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense*; and cooperate with the several States and the duly authorized officials thereof and with any organization

of motor carriers in the administration and enforcement of this part." (Italics supplied)

It is clear, therefore, that Congress desired to "foster sound economic conditions in" such transportation as well as to "preserve the inherent advantages of" transportation by motor truck. Congress declares also that it desires to "promote adequate, economical, and efficient service by motor carriers" and to develop and preserve an adequate *national* highway transportation system. All of these declared purposes require uniformity as to matters directly affecting interstate commerce. There can be no doubt that if the provisions of the Pennsylvania law against which the plaintiffs are protesting are upheld, they will nullify the "policy" and purpose declared by Congress. It cannot "foster sound economic conditions" in any industry involved in interstate commerce to set up forty-eight different requirements as to safety of operation and equipment. It cannot make for an efficient or economical service by motor carriers and develop and preserve a national highway transportation system to require them to use a different type of truck in each of the several states through which they travel with the same lading. The Pennsylvania statute is destructive of the declared policy of Congress.

In addition to the declaration of policy, the Motor Carrier Act, of course, does specifically set forth the powers of the Interstate Commerce Commission, whose principal duty it is to carry out and make effective the will of Congress. Among other things, the act makes it the duty of the Commission to establish reasonable requirements with respect to the safety of operation and equipment of both common and contract carriers. The relevant sections (49 USCA 304) read as follows:

"Sec. 204 (a) It *shall be the duty* of the Commission—

"(1) To regulate *common* carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and *safety of operation and equipment.*

"(2) To regulate *contract* carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and *safety of operation and equipment.*" (Italics supplied)

In pursuance of this authority and legislative mandate, the Commission has promulgated extensive safety regulations for motor carriers, and from time to time has instituted investigations and has examined its experience to ascertain whether there is need for additional safety requirements.

As shown by the record in this case (R. 525), such safety regulations have been promulgated by the Commission concerning, among other things, qualifications of drivers, driving of motor vehicles, reporting of accidents, parts and accessories necessary for safe operation, method of loading, and other phases of safety. The original regulations were promulgated on December 23, 1936, and have been in effect since July 1, 1937. These have been supplemented and revised from time to time. Prior to adoption of these regulations, the Commission's Bureau of Motor Carriers issued a booklet entitled, "Proposed Safety Regulations of the Interstate Commerce Commission Applicable to Motor Carriers Subject to the Motor Carrier Act, 1935."

Many detailed criticisms and comments, resulting from the distribution of more than 8,500 copies of this booklet, were carefully assembled and studied. There was an extensive record of conferences, correspondence, and testimony taken at three public hearings, the proceedings being identified and docketed at *Ex Parte* MC-4. The regulations mentioned, which are now in effect, are the first fruits of a connected program. This program embraces the three main fields of (1) reporting of accidents, (2) control of the driver, and (3) control of the vehicle. Regulations concerning control of the vehicle cover five points: (a) Identification of vehicles, (b) inspection and maintenance requirements, (c) special requirements for vehicles transporting dangerous articles, (d) parts and accessories necessary for safe operations, and (e) motor-vehicle regulations pertaining to the loading of equipment. When the safety regulations were prescribed, the Commission did not find that car-over-cab operations were unsafe.

While the regulations of the Commission dated December 23, 1936 seemed to us to be all inclusive and to apply to every type of truck operation on the highway, some question was raised in the Dauphin County Court (Pennsylvania) as to whether or not the Commission intended this formal set of regulations to apply to car-over-the-cab operations. So that there might be no doubt as to the intention of the Commission and its purpose to fully occupy the field, the plaintiffs filed a petition with the Interstate Commerce Commission asking for a reopening of *Ex Parte* MC-4 for the express purpose of "investigation and for the issuing of rules and orders governing the safety of operation of vehicles transporting automobiles, all or part of one car of which protrudes over the cab" (R. 670). The Commission, in issuing its order to reopen *Ex Parte* MC-4, limited the scope thereof to "investigating the safety of operation of motor vehicles used in the trans-

portation of automobiles, which motor vehicles are so constructed that all or part of one of the automobiles being transported protrudes over the cab, and of prescribing reasonable rules and regulations governing the operation of such motor vehicles."

Due notice of the reopening was given and special notice was sent to the Commonwealth of Pennsylvania. The Commonwealth appeared at the hearing and was given every opportunity to present testimony and to examine and cross-examine witnesses. A formal record was developed and subsequently Examiner Snow issued a report finding that there was no need for additional regulations pertaining to such operations (R. 671).

On March 11, 1939 the Commission issued a report (p. 40 jurisdictional statement) sustaining the conclusion of the examiner and concluding that:

> "*The record discloses no testimony whatsoever to show that the operations of motor vehicles used in transporting new automobiles which are so constructed that one of the automobiles being transported extends in whole or in part over the cab is unsafe.* On the contrary, the evidence is clear that the average number of *accidents* in which vehicles of this type are involved *is less than the country's average for all trucks.* We find no reasons of record why the operations of such vehicles should be forbidden. *The safety regulations heretofore prescribed by us, of course, apply to these as well as other vehicles operated by common and contract carriers in interstate or foreign commerce. The operation of vehicles so equipped are therefore permitted by the existing regulations and there is no need for change . . .*" (Italics supplied)

As stated previously, this report of the Interstate Commerce Commission was made in a formal proceeding

after notice to all interested parties including the Commonwealth of Pennsylvania, and after full hearing where all parties were given the opportunity to present evidence and to cross-examine. The Commonwealth was represented at the hearing.

By this report the Commission left no doubt that it did occupy the whole field by its general regulations issued December 23, 1936. That these regulations were recognized as sound and necessary for the industry is evidenced by their general adoption by state commissions for application to intrastate transportation. The Pennsylvania Public Utility Commission itself has adopted in toto the Interstate Commerce Commission regulations concerning the hours of service of truck drivers operating in intrastate commerce. Surely, therefore, the Pennsylvania Supreme Court is incorrect in its view that "the report is negative in character . . . and a careful study thereof discloses no intention that it was to constitute a formal rule or regulation of the Commission with respect to the operation of car-over-the-cab equipment." Perhaps we should state here, as indicated later, that the Pennsylvania Supreme Court did not discriminate between the order of the Commission dated December 23, 1936, the report of Examiner Snow on the reopening of *Ex Parte* No. MC-4, or the report of the Commission upon said reopening dated March 11, 1939.

Although the Federal Motor Carrier Act is of comparatively recent enactment, the courts have on several occasions been called upon to consider the question of the effect of the statute and orders and regulations issued by the Interstate Commerce Commission in pursuance thereof. The leading case on this question is *H. P. Welch Company v. New Hampshire*, decided on January 30, 1939, 306 U. S. 79; 59 S. Ct. 438. This court there held that the mere enactment of the Motor Carrier Act did not supersede the ap-

plication of hours of service prescribed by state statute, but since the record in that case indicated that, subsequent to the violations charged against that appellant, the Interstate Commerce Commission had issued regulations on the matter of hours of service, the court assumed, without deciding, that the state regulations would be superseded from the effective date of the Interstate Commerce Commission's regulations.

> "Without so deciding, we assume, so far as concerns the periods of continuous service condemned by the state commission, that *when the federal regulations take effect they will operate to supersede the challenged provisions of the state statute.*" (Italics supplied) (pp. 440-441)

This statement by the court is directly in point with the facts in the present case. It here appears that the Interstate Commerce Commission *has specially investigated the matter of the safety of equipment used by the plaintiffs* and, having found it to be safe, has authorized its continued use and operation, subject to existing safety regulations. In other words, Congress, through the Federal Motor Carrier Act and the action of the Interstate Commerce Commission in pursuance thereof, has occupied the field in question. The effect of that federal action is to exclude state regulation as to interstate commerce on the same subject matter.

The decisions of state courts on this point are fully in line with the assumption of this court in the Welch case. The question has recently been before the Supreme Court of Errors of Connecticut in *University Overland Express, Inc. v. Alsop, et al.*, 122 Conn. 275, 189 Atl. 458 (1937). There it appeared that the Connecticut Public Utilities Commission, under authority granted by a Connecticut statute, attempted to compel the plaintiff, which was en-

gaged in the transportation of automobiles by motor vehicle in interstate commerce, to carry certain amounts of insurance issued by companies licensed to do business in Connecticut. At the time the case was heard in the court below, the Interstate Commerce Commission had not yet promulgated rules and regulations with respect to insurance. Subsequent to the action by the court below, the Commission did issue such rules and regulations. The Supreme Court of Errors therefore held that the enactment of the Motor Carrier Act and the Commission's promulgation of rules and regulations thereunder relating to insurance superseded and rendered inoperative the power and authority of the state on the subject of insurance. On page 462 the court stated:

"To come in conflict with a law enacted by Congress or a regulation promulgated pursuant to it, the provisions of a state law or regulation, to be superseded by it, need not necessarily be in opposition or repugnant thereto. 'When Congress sees proper to act with respect to any particular branch of interstate or foreign commerce, State regulations in conflict therewith or acting upon the same subject are thereby superseded.' 5 R. C. L. p. 704. 'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition.' Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604, 35 S. Ct. 715, 717, 59 L. Ed. 1137, Ann. Cas. 1916D, 333, 'The elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress, on that subject are supreme,' (Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 435, 33 S. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203) 'and exclusive.' Missouri Pacific R. Co. v. Stroud, 267 U. S. 404, 408, 45 S. Ct.

243, 245, 69 L. Ed. 683. Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87, 101, 46 S. Ct. 279, 283, 70 L. Ed. 482."

To the same effect is the decision of the Supreme Court of New Hampshire in *University Overland Express, Inc. v. Griffin*, —— N. H. ——, 200 Atl. 390 (1938). In that case it was held that since the Interstate Commerce Commission had issued regulations for the insurance and financial responsibility of interstate carriers, a state act on that subject could not be enforced as to the plaintiff carrier. On page 392 the court stated:

> "The subject of the financial responsibility of interstate motor carriers has been *fully dealt with by the federal statute and the rules promulgated by the Interstate Commerce Commission* in accordance therewith. Supplementary as well as conflicting *regulations of the same subject by the states are, therefore, precluded* by the federal constitution as it has been interpreted by the Supreme Court. 'Congress, having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded.' Texas & Pacific Railway Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 485, 60 L. Ed. 874." (Italics supplied)

The language of the Pennsylvania Supreme Court in the instant case has a restricting and limiting effect which obviously was never intended by Congress. The Interstate Commerce Commission, after formal hearing in an investigation on its own motion, has established insurance requirements for motor carriers (*Ex Parte* 5). These apply to motor carriers generally, including those operators who transport cars over the cab of the transporting ve-

* Since the date that this brief went to press, we have been informed that Judge McMahon of the District of Columbia courts has ruled that a regulation of the District limiting the volume of gasoline which may be transported by motor vehicles has been superseded by the safety regulations of the I. C. C.

hicle. The decisions heretofore cited have held that the establishment of these requirements by the Interstate Commerce Commission supersedes, as to vehicles operating in interstate commerce, insurance requirements prescribed by the state legislatures or their agencies. Under the decision of the Pennsylvania Supreme Court, however, the Pennsylvania Legislature, or its agency, would have the power to prescribe and enforce even as to vehicles engaged in interstate commerce, insurance requirements which would be entirely at variance with those prescribed by the Interstate Commerce Commission.

The decisions above quoted are in accord with precedents and principles enunciated by this court in cases involving the validity of state acts relating to the safety of interstate railroad operations. In *Pennsylvania Railroad Company v. Public Service Commission*, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142 (1919), Mr. Justice Holmes stated (250 U. S. at 569):

> "The question whether Congress and its Commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State must be answered by a judgment upon the particular case. The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here."

Although the Pennsylvania statute, the Act of June 19, 1911, P. L. 1054, Sec. 7, was clearly a safety measure in requiring that the last car of every train be equipped at its rear with a platform thirty inches in width with guard rail and steps, it could not be given effect because Congress, through the Safety Appliance Act and the Commission regulations issued thereunder, indicated that the United States had exercised its exclusive power over this

phase of safety. Of interest is the court's statement on page 569:

> "The Interstate Commerce Commission is continually on the alert and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

Quite related to the facts in the present case are those in *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U. S. 87, 46 S. Ct. 279, 70 L. Ed. 482 (1926). There the Director of Agriculture of the State of Washington, under authority granted to him by an act of legislature of that state, established a quarantine on certain agricultural imports coming into the State of Washington. The question before the court was the validity of that quarantine inasmuch as an Act of Congress of August 20, 1912 had vested powers in the United States Secretary of Agriculture to establish such quarantines. The court held that the Act of Congress, even though the Secretary of Agriculture had not seen fit to impose a quarantine such as was thought proper by the State of Washington, superseded and rendered inoperative the state action. On page 102 of 270 U. S. the court stated:

> "It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject cannot be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture, that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that cannot be given to the federal statute. *The obligation to act without respect to the states is put directly upon the Secretary of Agriculture, whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary.* With the federal law in

force, state action is illegal and unwarranted." (Italics supplied)

The analogy between the Oregon-Washington case and the present one is quite close. In the former, the State of Washington attempted to exclude certain commodities which were thought to be unsafe for the public of that state. In the present case, Pennsylvania is attempting to exclude car-over-cab equipment apparently for the same reason. In both cases, the attempted action by the state authorities was in fields which had been "occupied" by federal regulation. It is submitted that the attempted "quarantine" of car-over-cab equipment by the Pennsylvania Legislature is inoperative and ineffective for the reasons set forth in the Oregon-Washington case. "The obligation to act without respect to the states" is quite as clear and direct in the Motor Carrier Act as in the quarantine act.

These principles of supersedure by occupancy have been applied by this court in a host of other cases.

In *Napier v. Atlantic Coast Lines*, 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432 (1926), the court held that state regulation had been superseded by an act of Congress vesting power to regulate locomotive construction in the Interstate Commerce Commission, which had made, however, no requirement inconsistent with the state legislation requiring certain cab curtains and automatic fire-box doors. Delivering the opinion of the unanimous court, Mr. Justice Brandeis stated broadly, at page 613 of 272 U. S., that:

> "* * * the fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

The Attorneys General of Georgia, Wisconsin, and Michigan were therein informed that:

> "Because the standards set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose. * * * If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

In the language of Justices Moody and White, in the case of *Missouri Pacific Railroad Company v. Larrabee Mills Company*, 211 U. S. 612, 29 S. Ct. 214, 53 L. Ed. 352 (1909), at pages 626-7 of 211 U. S., their dissent being now the law:

> "If the Commission has authority to deal with a question of this kind, those who have grievances ought to resort to that body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations and to leave them uncertain which government may rightfully assert its controlling authority."

In *Southern Railway Company v. Railroad Commissioner of Indiana*, 236 U. S. 439, 35 S. Ct. 304, 59 L. Ed. 661, (1915), the Supreme Court, conceding that Congress might so limit its regulations in regard to a matter of commerce so as to occupy only a limited field and leave a part of the subject open to state legislation, held, nevertheless that Congress had not followed that course in regard to safety on railroads, and that the federal safety appliance regulations covered the whole subject of car equipment to the exclusion of further action by the states.

Similarly, in *Northern Pacific Railway v. Washington*, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160 (1912), it was held that the federal hours of service act, which did not go into effect for a year, nevertheless at once superseded state regulations in that field of safety legislation. The Supreme Court held that Congress had assumed control of the subject so completely that, although the state law prescribed a shorter day's work for the employe than did the federal

act, Congress had acted and the states were precluded from making or enforcing any local regulations.

Other cases supporting the principles of supersedure herein set forth are:

Chicago, Rock Island & Pacific Railway Company v. Hardwick Farmers' Elevator Company, 226 U. S. 426, 33 S. Ct. 174, 57 L. Ed. 284 (1913);

Charleston & Western Carolina Railway Company v. Varnville, 237 U. S. 597, 35 S. Ct. 715, 59 L. Ed. 1137 (1915);

Southern Railway v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257 (1912);

Gilvray v. Cuyahoga Valley Railroad Company, 292 U. S. 58;

Morris v. Duby, 274 U. S. 135;

Atlantic Coast Line R. R. Company v. Virginia, 234 U. S. 280;

Texas & Pacific Ry. Company v. Rigsby, 241 U. S. 33;

Kelly v. Washington, 302 U. S. 1;

Michigan Central Railroad Company v. Vreeland, 227 U. S. 59;

New York Central Railroad Company v. Winfield, 244 U. S. 147;

Southwestern Greyhound Lines, Inc. v. Railroad Commission of Texas, 128 Tex. 560, 99 S. W. (2nd) 263;

Gulf, Colorado and Santa Fe Railway Company v. Hefley, 158 U. S. 98;

Missouri Pacific Railroad Company v. Porter, 273 U. S. 341.

Reference should be made, in this discussion, to the case of *South Carolina State Highway Department, et al. v. Barnwell Bros., Inc., et al.*, 303 U. S. 177, 58 S. Ct. 510, 182 L. Ed. 734, decided by the United States Supreme Court on

February 14, 1938, and heavily relied upon by the Pennsylvania Supreme Court. The court there considered Section 225 of the Motor Carrier Act which provides:

> "Sec. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle . . ."

The court stated that:

> "But appellees do not challenge here the ruling of the District Court that Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic and has left undisturbed whatever authority in that regard the states have retained under the constitution." (page 513)

In our view, one of the very serious errors of the court below is its construction of the purpose and effect of section 225 above quoted. On this point the Pennsylvania Supreme Court has the following to say (R. 691):

> "While Section 204 (a) 1, 2 and 3 of the act (49 U. S. C. A. 304) does confer upon the Commission power to establish reasonable requirements concerning safety of operation and equipment, the general language of this Section is necessarily modified and limited by the specific direction to the Commission set forth in Section 225 (49 U. S. C. A. 325) of the act 'to investigate and report on the need for federal regulation * * *'. Consequently it would appear that Congress intended to leave the regulation of such matters as *safety* and preservation of the highways in the control of the states until a future time." (Italics supplied)

We submit that no correct conclusion as to supersedure could be reached by any court which was convinced that all of the powers granted under section 204 (a) 1, 2, and 3 of the Motor Carrier Act are so drastically limited and modified by any direction or restriction in section 225. Section 225 was added after the act was originally drawn in order to make sure that the law did not abrogate the power of a state to prescribe maximum weights and sizes for vehicles operating over its highways. These matters are particular factors in the preservation and use of the highways. Many local roads are not built to carry loads which are comparatively harmless to other roads.

Under the Pennsylvania Supreme Court opinion, the Interstate Commerce Commission is denied powers necessary for the administration of the Motor Carrier Act. All of its power to provide for adequate service, for uniform and understandable systems of accounts, its power to prescribe maximum hours of service for drivers or any other employes, its power to provide any safety regulation (all of which powers are conferred by section 204), would be nonexistent. The opinions of all of the courts which have upheld any of the powers granted under section 204 would be nullified. Under the Pennsylvania decision, the only thing the Commission could do with regard to the above subjects would be "to investigate and report on the need for Federal regulation." The court further stated that Congress intended to leave the regulation of such matters as safety in the control of the states "until a future time." Not only is this conclusion incorrect, in our judgment, but it influences the whole court opinion on the question of supersedure. The court further states:

> "This intent of Congress to restrict the act to the regulation of commercial practices involved in motor transportation rather than to considerations of safety clearly appears from Section 202 of the Act (49 U. S. C. A. 302)."

It will thus be seen that the Pennsylvania Supreme Court was convinced that Congress did not intend that the Commission should have any power whatever (except to investigate and report) in connection with safety of operation and the other essential subjects enumerated in section 204. Of course, the court, with this conviction in mind, could not find that the Motor Carrier Act or the actions of the Interstate Commerce Commission thereunder superseded the Pennsylvania law.

The act here in question is not a "size and weight" provision. Sizes and weights of motor vehicles in Pennsylvania are covered in other sections of the Pennsylvania Motor Vehicle Code (75 PS 452, 453). These sections carefully and specifically set forth in definite measurements the maximum height, width, and length of vehicles. All of the vehicles of the appellants come well within every state size and weight law. Section 1033 (c) is not, and does not purport to be, a size or weight provision. If a portion of a vehicle protrudes over the cab of the transporting vehicle, its operation is prohibited regardless of whether the vehicle and its load may be within the maximum size and weight provisions. As a matter of fact, no one is urging that the operations forbidden by 1033 (c) contravene the height, width, and weight provisions of the code. The Commonwealth has contended throughout that the question is purely one of safety of car-over-cab operations. Section 204 of the Motor Carrier Act makes it the duty of the Interstate Commerce Commission to establish reasonable regulations with respect to "safety of operation and equipment". Section 225 does not remove that power nor encroach upon the extent of its application to a matter of safety where the prescribing of sizes and weights is not involved.

The facts in the present case present striking reasons in support of our argument as to supersedure. Inasmuch

as the plaintiff's equipment, by reason of the fact that the automobile factories are in the extreme north central part of the United States, must pass through a number of states in order to reach the points of delivery, the need for uniform regulation is apparent. The elimination of conflicting requirements and regulations so burdensome to interstate traffic doubtless motivated the framers of the Constitution to insert the commerce clause into that instrument. It has similarly led Congress in more recent years to enact the Federal Motor Carrier Act. The Commission's long experience and thorough knowledge of transportation problems throughout the country, its efficiency and its trained personnel induced Congress, notwithstanding opposition, to impose upon the Commission the vast labor involved in devising scientific, practical solutions for the intricate problems of safety of operation and equipment of motor vehicles engaged in interstate commerce. By this broad grant of administrative power, Congress has eliminated the inconveniences and hardships resulting from diverse and conflicting state regulations, and has made possible uniform yet flexible and progressive safety requirements for interstate carriers.

The reasoning by which the Pennsylvania Supreme Court avoided the application of these principles to the present case is as interesting as it is vulnerable. The court first considers various recent decisions of this court, pays lip service to the principles propounded in these decisions and then asserts the shocking proposition "that state regulations pertaining to general safety problems have not been superseded". The public, in whose interest the Motor Carrier Act was passed, and the great industry which accepted the principle of federal regulation, now are confronted with a decision which nullifies one of the important phases of the law and says that the instruments of commerce must comply with both federal and state safety regulations even if they are wholly irreconcilable. This

leads to just such situations as recently prevailed when New Jersey decreed that all passenger buses must have metal window guards and New York ruled that they must be taken off if a bus was to enter that state. Such absurd requirements led to almost unavoidable and constant violation of both laws. To subscribe to such a doctrine is to make impotent the commerce clause, which has been constantly utilized since *Gibbons v. Ogden*, 9 Wheat. 1, to avoid conflicting state regulations on interstate commerce.

It is difficult to understand how this conclusion could be reached by the same tribunal which only a year previously had held, in *McNeely & Price Co. v. Philadelphia Piers, Inc.*, 329 Pa. 113, that state regulation of wharfage charges was barred by federal regulation of such charges through the U. S. Maritime Commission and the Interstate Commerce Commission. There the court, after an exhaustive discussion of the subject said:

> "It is, of course, well settled that *any* Act of Congress on *any* phase of interstate commerce, supersedes *any* state statute which is in conflict therewith. It appears to be equally well settled that when the national legislature enters any field of regulation into which it is constitutionally admissible, the state legislature already occupying the same field must get out *even though no statutory expression of the National legislature has as yet come into conflict with a state regulation.*" (Italics supplied)

In this connection it is interesting to note the recent opinion of the special 3-judge statutory court, convened in the District Court of Columbia in the case of the *American Trucking Associations, Inc., et al. v. U. S. and Andrews*, Civil Action No. 3200, in which the powers and duties of the Interstate Commerce Commission with respect to regulation of interstate motor carriers were carefully considered. The majority there held that the Commission

had the power and the duty to establish maximum hours of service for all employes of common and contract carriers by motor vehicle. The dissenting judge contended that the Commission's powers were limited to those employes whose activities affected safety of operations. All of the judges, however, were unanimous in stating that it was the deliberate intention of Congress to occupy the field of interstate highway transportation. The reasoning of all of the judges is directly contrary to the decision of the Pennsylvania Supreme Court in the instant case since the federal court held that the Commission would have the power and the duty to prescribe hours of service at least with respect to certain classes of employes and that such power was derived from the very same section which the Pennsylvania court stated did not confer any powers as to safety on the Interstate Commerce Commission. The decision of the federal court was reached after considering the purpose and meaning of section 225. It did not hold, as did the Pennsylvania Supreme Court, that this section limited the action of the Commission "to investigate and report on the matter for federal regulation."

The following excerpts from the majority and dissenting opinions in the American Trucking Association's case are particularly appropriate to this issue:

From the majority opinion:

> "* * * The stated objects demonstrate beyond question that Congress has preempted the entire field. To the achievement of the ends sought, Congress provided that it should be the duty of the Commission to regulate carriers by establishing reasonable requirements with respect to (a) service; (b) transportation of baggage and express; (c) uniform systems of accounts, records, and reports; (d) qualifications and maximum hours of service of employees; (e) safety of operation and equipment.

> "* * * It is not unreasonable, in these circumstances, to assume that Congress, aware of the problem as it applied to interstate commerce and the advisability of uniformity, chose to place upon the Commission the details of its solution * * *"

From the dissenting opinion:

> "Congress was confronted with a situation which demanded a practical solution. Casualties on the road had become countless. The legislative history seems to evidence a purpose to effect safety of operation * * *"

The Pennsylvania court further stated in its opinion that:

> "In arriving at this conclusion we have not overlooked the report of the Interstate Commerce Commission originally dated December 23, 1936, which is printed as an appendix to plaintiff's brief." (R. 692)

The court then states that the report is not part of the record. This is obviously incorrect, and the effect of this error is felt all through the decision. The regulations of December 23, 1936 were before the court below and were in the formal record as plaintiff's Exhibit 2 (R. 525). The Pennsylvania Supreme Court evidently referred to the subsequent reports of the Examiner and the Commission after the reopening of the proceedings, but they are entirely separate and distinct from the original order of the Commission. The record indicates that appellants, having already placed Exhibit 2 in the original record, requested remission of the record to introduce evidence regarding these new orders (R. 656). The Court refused the petition but ordered that the effect of the petition for reopening the proceedings at *Ex Parte* MC-4 and the report that had been filed could be argued on the appeal (R. 678). With regard to the March 11, 1939 report of the Commission, moreover, Sec. 14 (3) of the Interstate Commerce

Act (49 USCA 14) provides that the reports of the Commission "shall be competent evidence * * * in all courts of the United States and of the several states *without any further proof or authentication thereof.*" (Italics supplied)

In addition to the foregoing, the effect of the Commission's actions was briefed and argued. The Pennsylvania Supreme Court considered this point and held that such actions did not supersede the state law. The reasons given for this conclusion were:

> "The report is negative in character, is based entirely on ex parte testimony, and a careful study thereof discloses no intention that it was to constitute a formal rule or regulation of the commission with respect to the operation of car-over-the-cab equipment. Certainly it cannot be regarded as having a purpose to replace existing state law upon the subject." (R. 693)

We are unable to understand what was meant by the court by the statement that the report is "negative in character." It seems to us that the only possible basis for such a conclusion is that the court had in mind only the March 11 order. Even there the conclusion that the Commission in its report did not prescribe additional affirmative regulations is questionable. A reference to the March 11 report of the Commission* will demonstrate that there can be no question that the whole subject was carefully considered by the Commission. It reviewed the application of its original safety regulations of December 23, 1936; reiterated that such regulations, which are many in number and diverse in character, applied to car-over-cab operations and fully discussed the problems of safety presented by car-over-cab operations. The conclusion of the Commission on the basis of the record before it and its own in-

*The full text of this report will be found beginning at page 40 of the printed jurisdictional statement. It is also reported at 12 M. C. C. 127.

dependent investigation is that there is no need for additional regulations covering this type of operation other than those previously prescribed.

The Pennsylvania Supreme Court asserts that the report "is based entirely on ex parte testimony." If this were true, the Commonwealth of Pennsylvania has no one to blame but itself. It was notified of the proceeding, its counsel entered appearances at the hearing and had every opportunity to examine and cross-examine witnesses and present testimony. The Commission's order further indicates that the Commonwealth was specially urged to participate and that the recommended report of the examiner was given wide publicity. Surely the Commission was not compelled to try to force the Commonwealth to participate. The Commission stated that it attempted to develop the pertinent facts adequately and that "with this end in view, we have had the record examined carefully by the technical men on our staff to determine whether or not it contains an adequate presentation of the facts. They think that it does."

As a final reason for negativing the effect of the report the Pennsylvania court states that "it cannot be regarded as having a purpose to replace existing state law upon the subject."

We submit that one of the best evidences of the intention of the Commission and its purpose in adopting the *Ex Parte* MC-4 regulations of December 23, 1936 is in the fact that the commission itself is before this court, declaring, in brief and possibly by argument, a purpose directly contrary to the one just quoted from the Pennsylvania Supreme Court. The Commission says its intent and purpose was to issue regulations governing car-over-the-cab operations as well as operations of other motor carriers. Here again we call attention to the fact that the court an-

parently entirely overlooked the original order of the Commission (Exhibit 2).

Even referring to the order of March 11, however, we are wholly unable to understand the basis for such a conclusion. All of the relevant facts point to exactly the contrary. The petition for reopening of the proceeding at *Ex Parte* MC-4 (R. 666) specifically referred to the Pennsylvania law and the legal proceedings had thereon. The petition further refers to the extensive damages which would be incurred if the Pennsylvania law were enforced, not only to the operators, but to the automotive industry, the employes of the operators, and the automobile dealers. The orders of the examiner and of the Commission specifically refer to the Pennsylvania statute and the proceedings had thereunder and the fact that the conclusions reached by the Commission are "not in harmony with a provision of the laws of the Commonwealth of Pennsylvania which prohibits the operation of vehicles of the type in question". With these facts in mind, it is difficult to perceive the basis for the Pennsylvania court's conclusion that it was not intended by the Commission to "replace existing state law."

It is respectfully submitted that the Supreme Court of the Commonwealth of Pennsylvania in the rendition of its decision was confused as to the existing facts disclosed in the record of the proceedings, and that by reason of such confusion it did not and could not correctly apply the law to the issues involved. For instance, the Supreme Court in its opinion stated:

> "In arriving at this conclusion we have not overlooked the report of the Interstate Commerce Commission originally dated December 23, 1936 * * * which is printed as an appendix to plaintiff's brief. This report was issued upon the plaintiff's petition with the Interstate Commerce Commission to reopen the pro-

ceedings Ex Parte MC-4, which was filed by the plaintiff after the entry of the decree nisi by the court below, and *it was not considered by the court below, nor is it part of the record on this appeal.* The report is negative in character, is based entirely upon ex parte testimony, and a careful study thereof discloses no intention that it was to constitute a formal rule or regulation of the Commission with respect to the operation of car over the cab equipment. Certainly it cannot be regarded as having a purpose to replace existing state law upon the subject * * *" (Italics supplied)

We risk repetition of part of the above quotation because it evidences the fact that the Supreme Court did not consider nor understand Exhibit 2, which was a copy of the Commission's original order in *Ex Parte* MC-4. More particularly described, Exhibit 2 is a certified copy of the following orders and regulations issued by the Interstate Commerce Commission, namely: Safety Regulations—Rules and Regulations Governing Qualifications of Employees and Safety of Operation and Equipment of Common Carriers and Contract Carriers by Motor Vehicle, dated December 23, 1936; Order of the Interstate Commerce Commission, entered March 18, 1937, in Ex Parte No. MC-4, "In the Matter of Report of Accidents required by the regulations prescribed by our order dated December 23, 1936"; Order of the Commission, entered June 5, 1937 in Ex Parte No. MC-4, "In the Matter of Qualification of Employees and Safety of Operation and Equipment of Common Carriers and Contract Carriers by Motor Vehicle"; Order of the Commission, entered June 5, 1937, in "Qualifications of Drivers" and Notice of June 5, 1937 in "Qualification of Drivers."

It is readily apparent that the Supreme Court of Pennsylvania, in making its reference in its opinion to the action of the Interstate Commerce Commission, meant to refer

to the report of Division 5 of the Interstate Commerce Commission, decided March 11, 1939, entitled, "Ex Parte No. MC-4 In the Matter of Qualifications of Employees and Safety of Operation and Equipment of Common and Contract Carriers by Motor Vehicles. In re Car-Over-Cab Operations." It is likewise apparent that the Supreme Court of Pennsylvania did not review the rules and regulations and orders of the Interstate Commerce Commission pertaining to safety of operation and equipment of common and contract carriers as contained in Exhibit 2 in the within proceedings. It apparently never looked at these important rules. Had it done so, it is respectfully submitted that it could not have stated as it did:

> "The report is negative in character, is based entirely upon ex parte testimony and a careful study thereof discloses no intention that it was to constitute a formal rule or regulation of the Commission with respect to operation of car over the cab equipment."

If the Supreme Court of the Commonwealth of Pennsylvania was fully cognizant of what was contained within the rules and regulations and orders of the Interstate Commerce Commission, as contained in Exhibit 2 herein, surely it could not have called the prescription of such rules and regulations by order of the commission merely a "Report * * * negative in character." It is therefore respectfully submitted that the Supreme Court of the Commonwealth of Pennsylvania has misinterpreted the facts as developed in the record.

The court's attention is likewise directed to the fact that the rules and regulations of the Interstate Commerce Commission, prescribed by the Commission under its order dated December 23, 1936, pertain strictly to the safety and operation of motor vehicle equipment by common and contract carriers, and in particular, said rules and regulations, under Rule No. 34 thereof, provide as follows:

> "34. No motor vehicles shall be so loaded as to obscure the driver's view ahead or to either side or to interfere with the free movements of his arms or legs, or to prevent his free and ready access to the accessories required for emergency."

This rule, as well as all others set forth in Exhibit 2, applies to the car carriers now before you. The very question of the driver's view ahead or to either side was prominent in this case below, the Pennsylvania Supreme Court saying:

> "(c) The extension of the carried automobile and the vertical framework supporting it over the cab of the truck-tractor obstruct the vision of the operator, as well as that of drivers of overtaking vehicles."

The court later referred to the question of vision in the latter part of its opinion, where it said that "it would seem to us that the detrimental effect upon balance, steering, braking, and *vision* remains the same." (Italics supplied)

Obviously this condition was at least a persuasive influence in the court's conclusion. The court overlooked the fact that this very matter had been specifically treated in a formal proceeding (*Ex Parte* MC-4) and that Rule 34 entirely covered the situation.

A re-reading of this rule will disclose nothing "negative in character" about it, and as to its disclosing no intention to constitute "a formal rule or regulation of the Commission with respect to operation of car-over-the-cab equipment", we have the Commission's own words in its Division 5 order of March 11, 1939, as follows:

> "The safety regulations heretofore prescribed by us, of course, apply to these as well as other vehicles operated by common and contract carriers in interstate or foreign commerce. The operation of vehicles so

equipped are therefore permitted by the existing regulations and there is no need for change."

"Existing regulations" refer, of course, to Exhibit 2. Other safety regulations which have particular significance to car-over-the-cab operations are rules 10 (R. 525) and 17 (R. 525-40) pertaining to the care of the lading, including use of chains, ropes, etc., and the negotiating of turns. There is no proper way to interpret such statements except to say that it was the intention of the Commission actually to regulate car-over-the-cab operations when it issued Exhibit 2 and that it made this intention crystal clear in its statement of March 11.

In view of this direct statement, the Supreme Court of Pennsylvania was not called upon to speculate as to the "intention" of the Commission as to this phase of the case.

Let us refer again briefly to the March 11 report of the Commission. When the present proceeding first came on for trial in the county court in Pennsylvania, the order of the Commission known as *Ex Parte* MC-4 was already issued and outstanding. Plaintiffs believed it, together with the Motor Carrier Act, controlled the question of supersedure and so urged in the court below, introducing the order as Exhibit No. 2. The defendants, however, so pressed their view that Exhibit No. 2 did not cover car-over-the-cab operations, and the lower court was so obviously inclined to support that view, that plaintiffs filed a petition with the Interstate Commerce Commission, urging it to reopen the record "for the purpose of investigation and for the issuing of rules and orders governing the safety of operation of vehicles transporting automobiles, all or part of one car of which protrudes over the cab." The court will remember that instead of finally securing new rules, regulations, or orders covering car-over-the cab operations, we were told, as quoted above, that the operation of such

vehicles was permitted by existing regulations and that there was no need for change. The order of the Commission indicates that the reopening was solely for the purpose of making new rules or regulations which might be necessary to insure the safety of operation of the equipment in question here. The relevant part of the order of the Commission is as follows:

> "*It is ordered*, That this proceeding be, and it is hereby, reopened solely for the purpose of investigating the safety of operation of motor vehicles used in the transportation of automobiles, which motor vehicles are so constructed that all or part of one of the automobiles being transported protrudes over the cab, and of prescribing reasonable rules and regulations governing the operation of such motor vehicles."

The result of full hearing and consideration was the clear, and we submit affirmative, order of March 11, among the important parts of which is the statement that the commission had already prescribed safety regulations covering car-over-the-cab operations and that it now found "no need for change."

The Supreme Court of Pennsylvania, moreover, does not explain, when it says that the report (March 11) "issued on plaintiff's petition * * * was not considered by the court below, nor is a part of the record on this appeal", that it was the Supreme Court's own order which prevented this order from being a part of the record since it refused our petition to remit the record.

To summarize this phase of the argument, the appellants respectfully contend that on December 23, 1936 the Interstate Commerce Commission, pursuant not only to its power but also to its duty conferred by the Motor Carrier Act, adopted extensive regulations "pertaining to safety of operation and equipment." These regulations

have been supplemented from time to time, and the Commission reopened the proceeding specifically to ascertain whether there was need for additional regulations at the present time pertaining to safety of car-over-cab operations and equipment. After a formal hearing with due notice and an insistent invitation to the Commonwealth of Pennsylvania to participate, and after checking the testimony independently by its own technical advisers, the Commission concluded that these operations under the existing safety regulations are not unsafe and there is no need for additional regulations at the present time. Surely these actions by the Interstate Commerce Commission, the agent of Congress, occupied the field of safety of car-over-cab operations and superseded the Pennsylvania law on this particular subject insofar as interstate commerce is concerned.

II.

EVEN IN THE ABSENCE OF FEDERAL LEGISLATION, SECTION 1033(c) OF STATUTE PLACES A DIRECT AND UNREASONABLE, ARBITRARY AND INVALID BURDEN ON INTERSTATE COMMERCE

The statute in question, even in the absence of action by Congress, must be held invalid, as applied to interstate motor carriers, because it affects interstate commerce, not remotely and incidentally, but directly and unreasonably almost to the extent of prohibiting it.

The paramount authority of Congress under the Commerce Clause has often conflicted with the police power of the states, under the division of jurisdiction created by our federal constitution. In 1824, in the famous case of *Gibbons v. Ogden*, 9 Wheat. 1, the Supreme Court established basic methods of differentiation between the spheres of state and federal jurisdiction. The Court held that the completely internal commerce of the states had been reserved

by the constitution to the authority of the individual states. On the other hand, the power of Congress was applicable to commercial intercourse embracing the territorial limits of the several states. Having defined the zone in which state power is exclusive, the Court simply held, on the other hand, that the actual assertion of power over interstate commerce by Congress excluded its regulation by the states. Chief Justice Marshall, at page 200, briefly stated that:

> "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant of Congress or is retained until Congress shall exercise the power."

The record in this appeal establishes that car-over-cab vehicles constitute an agency used in interstate commerce which requires uniformity of regulation even in the absence of federal legislation. In the recent case of *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3 (1937), the Supreme Court, through Mr. Chief Justice Hughes, clearly stated this rule as to uniformity (302 U. S. 14):

> "*Third.* The remaining question is whether the state law must fall in its entirety, not because of inconsistence with federal action, but because *the subject is one as to which uniformity of regulation is required*, and hence, whether or not Congress has acted, the state is without authority. Cooley v. Board of Wardens, 12 How. 299, 319, 13 L. Ed. 996; Minnesota Rate Cases, 230 U. S. 352, 399, 400, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.
>
> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations

which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the states. *The state of Washington might prescribe standards, designs, equipment, and rules of one sort, Oregon another, California another, and so on.* But it does not follow that in all respects the state act must fail.

"* * * *If, however, the state goes further and attempts to impose particular standards as to structure, design, equipment, and operation,* which in the judgment of its authorities may be desirable, but pass beyond what is plainly essential to safety and seaworthiness, *the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.* Whether the state in a particular matter goes too far must be left to be determined when the precise question arises." (Italics supplied)

In other words, there are certain features of interstate commerce which require uniformity of treatment while certain incidents of interstate commerce may involve a strictly local movement permitting them to be subject to much broader state regulation without unduly burdening those engaged therein. Thus, we ought to distinguish those cases in which the Supreme Court has upheld state regulation where its nature, its function, the character of the business involved, and its actual effect on the flow of interstate commerce led to the conclusion that such regulation really concerned interests purely local and did not infringe the national interest in maintaining the freedom of commerce across state lines.

These refinements of constitutional principles were incidents of the development in railroad transportation.

Railroad transportation had at first admitted of diversity of control. When it had grown to an organic system demanding national control the states had, nevertheless, some incidental power to make regulations that did not, in view of the local needs for protection, unduly burden the flow of interstate commerce. A similar, though more rapid development has occurred as to the comparatively infant industry of motor transportation.

Motor carriers at first were of a nature permitting diversity of treatment by the states. In 1921, even in the Commonwealth of Pennsylvania, auto bus transportation was "largely in the hands of individuals and extending over comparatively short routes, and usually serving localities of limited areas": *Chambersburg G. & W. Street R. Company v. Hardman*, P. U. R. 1921 C. 628, 631.

This rule applied to many local agencies even though they were engaged in interstate commerce. Particularly it was the rule as to harbors, interstate bridges, ferries, and like services. Subjects imperatively demanding a single uniform rule, on the other hand, were the newer, more organic and unified forms of trade and transportation. Railroads and now motor carriers, are typical examples. As to the latter cases, in which the federal power was exclusive, the Supreme Court construed the silence of Congress as follows:

> "Its inaction on this subject * * * is equivalent to a declaration that the interstate commerce shall be free and unitrammeled":
>
> *Welton v. Missouri*, 91 U. S. 275 (1875), 23 L. Ed. 347.

In the railroad situation, uncertainty, confusion, and conflict resulted as they entered an era of wide expansion. In 1886, however, the Supreme Court definitely held that interstate transportation of persons and property was a

matter of national concern requiring uniformity of regulation: *Wabash Railway Company v. Illinois*, 118 U. S. 557, 7 S. Ct. 4, 30 L. Ed. 244 (1886).

As indicated previously, the facts in the present case show that plaintiffs and other motor carriers transporting automobiles are engaged almost exclusively in interstate commerce.

Even in the absence of federal legislation, the Pennsylvania law creates an arbitrary and invalid burden upon interstate commerce. The defendants must concede that the automobiles are not manufactured in Pennsylvania, that the greatest centers of the manufacturing and assembling of automobiles are west of Pennsylvania, that all traffic moving into New York State, the New England states, New Jersey, District of Columbia, Delaware, and Pennsylvania, and substantial portions of traffic moving south, must come into or go through the state of Pennsylvania.

The Pennsylvania statute here in question clearly comes within the category of regulations which do not merely affect interstate commerce in an incidental manner. The provision in question is one which practically prohibits the use of certain equipment in Pennsylvania. It thus comes clearly within the ban of prohibited laws since it is one preventing uniformity. As stated by Mr. Chief Justice Hughes, in *Kelly v. Washington*, *supra*, (302 U. S. 14, 15):

> "*If, however, the state goes further and attempts to impose particular standards as to structure, design, equipment, and operation*, which in the judgment of its authorities may be desirable, but pass beyond what is plainly essential to safety and seaworthiness, *the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress*

which can establish a uniform rule. Whether the state in a particular matter goes too far must be left to be determined when the precise question arises." (Italics supplied)

The challenged section of the Pennsylvania statute in question, unlike the sections defining permissible lengths and maximum heights, makes no provision safeguarding the rights and investment of existing operators of equipment duly licensed by the Commonwealth of Pennsylvania over a reasonable period of time. Moreover, the section in question, although drawn in terms which on its face applies equally to vehicles moving in interstate and intrastate commerce, in fact, because of the nature of the motor convoy business and the location of automobile factories, affects almost exclusively interstate commerce. Transportation by auto convoys, insofar as Pennsylvania is concerned, is almost entirely interstate.

It seems clear, therefore, under the authorities cited above, that the section of the Pennsylvania statutes in issue is constitutionally inoperative since it constitutes a direct and unreasonable burden upon interstate commerce. Even in the absence of national legislation, the Constitution permits only "appropriate state regulations adopted primarily to promote safety on the highways and conservation in their use . . . where the indirect burden imposed upon interstate commerce is not unreasonable": *Buck v. Kuykendall*, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623 (1925).

III.

SECTION 1033 (c) OF THE STATUTE DEPRIVES APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW SINCE THE MEANS ADOPTED ARE ARBITRARY AND UNREASONABLE AND HAVE NO REASONABLE AND DIRECT RELATIONSHIP TO THE PUBLIC SAFETY

Aside from our contentions predicated upon the commerce clause, we respectfully urge that Section 1033 (c) violates the due process clause of the Fourteenth Amendment.

Concededly, the Commonwealth of Pennsylvania possesses police powers, vested in the Legislature, for the purpose of protecting its citizens from the few who, regarding only their own interests, profits, or passions, may be willing to imperil the health, peace, morals, or security of the many. The legislative branch of the state has constitutional power to determine, primarily, what measures are appropriate or needful for the protection of the public health, the public morals, or the public safety.

Under the constitutions, both of the United States and of Pennsylvania, there are of necessity limits beyond which state legislation cannot rightfully go. It is well settled that if a statute purporting to have been enacted to protect the public morals, health or safety "has no real or substantial relation to those objects" or "is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution": *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, at 297, 31 L. Ed. 205 (1887). Similarly, in *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499, at 503, 38 L. Ed. 385 (1894), this court restated the established doctrine that:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear * * *

that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

Whether a statute employs means which are reasonable and appropriate is obviously not to be determined by assumption or by a priori reasoning: ex facto ius oritur. The most legitimate of ends will not justify means which are unduly drastic or bear no substantial relationship to those ends.

Adams v. Tanner, 244 U. S. 590, 37 S. Ct. 662, 61 L. Ed. 1336 (1917);
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922);
Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 S. Ct. 320, 70 L. Ed. 654 (1926).

In view of these well-settled and fundamental principles, the controlling question of this phase of the case is whether the prohibition against transporting any portion of a motor vehicle over the cab of the carrying vehicle is reasonably necessary for the promotion of highway safety, and is not unduly oppressive. The answer to this question depends upon the relevant facts. Our case is somewhat simplified by the fact that all parties agree that the only justification for the law is its alleged necessity as a safety measure. The public morals, health or welfare are not involved. Neither congestion of the highways nor their preservation are before the court. Neither weight, height, length, nor width of trucks have anything to do with the case.

As stated by the Chancellor at R. 465, 466:

"Whether it is safe to put an extra automobile on top of the cabin which is the only issue we have."

The Commonwealth's position is that the act must be sustained as a safety measure (R. 213):

"We are just attempting to justify the law as a safety measure, as a proper exercise of police power."

A reading of the testimony and a study of the exhibits in this case indicate that the provisions of the act in question are arbitrary and unreasonable and have no reasonable or direct relationship to the public safety. The act attempts to exclude plaintiffs' equipment from the highways *because of an immaterial peculiarity in the type of that equipment not related to safety.* This is apparent from a consideration of the following:

1. The fact that cars are carried partly or wholly above the cab of the carrier or over the head of the operator of such carrier vehicle has not caused any accidents, contributed thereto or increased or aggravated any injury either to person or property.

A careful study of the record will completely corroborate this statement. (Mordan, R. 47, R. 48; Lawrence, R. 60, R. 73, R. 75, R. 76; John G. Reeser, R. 84; Maurer, R. 97; Thompson, R. 120, R. 121; Boutell, R. 167, R. 172, R. 173, Albert, R. 189; Tiffenbaugh, R. 195; Wright, R. 207, R. 208; Krout, Eyster, Franc, Snyder, Spreecher, Koscis, R. 209, R. 210; Tama, R. 289; Baxter, R. 338; Edwards, R. 351; Costa, R. 439.)

Even though the appellees, the Secretary of Revenue, and the Commission of Motor Police, have records of all accidents occurring in the state, they were unable to produce evidence of any accident which was caused by the equipment here in question. In fact, it was necessary for the appellees to go back four years to find only five accidents in Pennsylvania and one in New York involving car-over-the-cab equipment. This is true even though the equipment operated during such years could not have been as well or safely designed as that now in use and was not subject to Interstate Commerce Commission regulations.

A glance at the record shows that the accident in Mt. Pocono was not caused by the presence of a car over the cab, and no damage was caused as the result of the car being over the cab (R. 271, R. 274, R. 275, R. 277). It may have become partly detached, but we submit that under the circumstances surrounding that accident, any kind of cargo would have become detached. We think the facts surrounding this accident indicate the safety of such an operation, rather than any lack of safety (R. 269-280, R. 280-283).

The same is true as to the other four accidents except possibly the one at Erie (R. 290-304). In that case the testimony clearly shows that the car over the cab had nothing whatsoever to do with the death of the driver of the other car. The finding of the chancellor (R. 484) is that there was a collision; that the car over the cab became partially detached, and damaged the other automobile "as the result of which collision the operator of the other car received fatal injuries". But if an implication was intended to the effect that the injuries had anything to do with the presence of the car over the cab, such implication is not supported by the record. The car did not come off the runway except as to the two back wheels which were forward on the carrier. One of these rested partially on the back of the top of the Buick car, and it is possible that it made a small dent in the top. The testimony of the appellees' own witnesses, however, was to the effect that this had nothing to do with the injury or death of the operator (R. 297, R. 301-302, R. 304). The car maintained its position over the cab better than any other cargo carried lawfully upon the highways every day would have done under the same circumstances.

The evidence as to the accident in New York, four years ago, is so general and indefinite that conclusions cannot be drawn from it. There was no identification of

the equipment nor evidence as to how the accident happened (R. 210-213); it should also be noted that the equipment there involved, having been used four years ago, was not subject to the safety regulations since prescribed by the Interstate Commerce Commission.

As stated above, the appellees' evidence indicates five accidents in Pennsylvania over a period of four years. This is an average of one and a quarter accidents per year. This supports the accident frequency figures which were introduced and the accident records which were maintained by the companies. It does not prove, or tend to prove, that this equipment is unsafe. On the contrary, it justifies the low insurance rating which has been established and maintained covering this type of service. There is no such thing as absolute safety, either on the highway or off it. The court, upon thoroughly studying the record in this case, will discover that the car-carrying equipment in question here has approached absolute safety more nearly than any other class of commercial automobiles on the highway.

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2. Vehicles carrying another vehicle, any part of which is above the cab of the carrier or over the head of the operator of the carrier vehicle, have developed a smaller accident frequency than commercial motor vehicles hauling other commodities.

The uncontradicted evidence on this phase of the case is found in the following pages of the Record: 69-72, 73, 74, 113-115, 168; Plaintiffs' Exhibits 5, 6, 7, 18 and 19. See also the following testimony: Mordan, R. 44, 45, 47, 48, 50, 57; Lawrence, R. 74, 86; John G. Reeser, R. 85, 90; Maurer, R. 93, 95, 99; Boutell, R. 168, 179, 181; Tiffenbaugh, R. 196; Francis, R. 130-132, 134, 147-149, 152-154; Plaintiffs' Exhibits Nos. 18, 19.

The safety of operation is well shown by comparison of the accident frequency of motor car convoys with the accident frequency of other classes of trucks. The figures used are on the basis of the number of accidents per hundred thousand miles and are found in Plaintiffs' Exhibit No. 7 (R. 534) which consists of statistics assembled by the National Safety Council. This exhibit shows eighteen different classifications, the average accident frequency of which is 3.44. They range from accident frequency of 2.02 for inter-city trucking to 6.46 for newspaper trucking. As contrasted with this, a typical car carrier operated a certain class of convoys with a part of the car over the cab a distance of 3,351,200 miles in a year, with an accident frequency of .68. His other types of trucks, which also carried a part of the car over the cab, were operated 1,445,600 miles with an accident frequency of 1.38 (R. 44). The average of these rates is less than half the lowest rate of any other classification.

Responsible insurance men also testified that the rates for car carriers were lower than the rates for other trucking. The record thus indicates, contrary to the uninformed opinion of many, that the safest trucking operations on the highways are those outlawed by the Pennsylvania statute on the unsupported theory that they are unsafe. Not a single witness of the many called on both sides of the case could testify that they had ever seen or known of an accident caused by a car being over the cab nor that he knew of an accident in which the damage or injury was greater by reason of the fact that a car was carried over the cab. Certain exhibits were introduced by the defendants showing pictures of accidents in which car carriers were involved. One or two of these showed that the car carried over the cab was off the cab at the time the picture was taken. On the contrary one operator stated that he has driven over 500,000 miles without any sort of an accident. It would be just as reasonable for the appellants to claim

that this driver's record was the record of all drivers as it would be for the appellees to claim that the few accidents which they were able to show as having occurred in the many millions of miles of travel in any sense reflected the true situation. There are literally thousands of accidents every day with many types of motor vehicle but not any, so far as the record shows, have been caused or aggravated by the condition which the Pennsylvania law here undertakes to prohibit.

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3. The equipment under consideration complies with the size and weight limitations prescribed in the Pennsylvania Vehicle Code as well as with the requirements relating to front and rear wheel weights.

The parties to this proceeding do not question the limitations prescribed in The Vehicle Code as to the weight and size of motor vehicles. In entirely different sections (902 and 903 of that code, 75 PS 452, 453), detailed weight and size limitations are set forth applicable to all motor vehicles. These provisions of the law are in no sense violated nor do they affect the operation of the present equipment of such carriers. In connection with the distribution of weight upon car carriers in general, and particularly upon the equipment used by the appellants, the court below apparently entirely misinterpreted the ordinary laws of physics. We have in the opinion the following unusual statement:

> "* * * From the evidence in the present record it would seem to us that the detrimental effect upon balance, steering, braking and vision remains the same, whether any part of the carried vehicle, or of its weight rests upon the cab, or is directly above the cab of the carrier vehicle." (R. 693)

This construction completely overlooks the balancing of weights effected by the placing of the fifth wheel on semi-trailers at the rear of the rear axle of the tractor. In other words, the court states that the placing of all the weight of the trailer and its load at a point above or behind the rear axle of the tractor has the same effect upon "balance, steering, braking and vision" as if the weight were placed directly on the cab a short distance back of the front axle. Obviously, the whole balance would be shifted by such an arrangement. If the fifth wheel were on or back of the rear axle, the effect must be to lighten the weight on the front wheels, to raise the light beams, and to make steering easier.

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4. The vertical center of gravity of the equipment here in question is not higher than that of an ordinary commercial truck loaded with only four feet of cargo.

Important parts of the only testimony concerning the location of the vertical center of gravity in loaded equipment such as the appellants operate are as follows:

"Q. Now, will you tell us with reference to Exhibit 302, when loaded, approximately what the center of gravity is up and down? I mean, by just referring to the model, now, if you will, by picking out a point on it.

"A. Well, I can't pick out a point by looking at it, but I would say it will be in the neighborhood of four and a half feet from the ground.

"Q. Now, will you tell us approximately what part of the total weight that is, what proportion?

"A. In that case, it is about thirty-five per cent. of the height—thirty-five to forty per cent. of the height." (R. 132)

The above is the testimony of Mr. Francis, a mechanical engineer and designer. He then introduced a number of exhibits showing the approximate location of the vertical center of gravity. His company has built almost one half of all the equipment now used. He himself is responsible for building safety into these convoys.

This was followed by the direct testimony of Irving H. Judd, a man whose long experience and thorough knowledge should have impressed the Court. His company makes many car convoys, and he was the only witness who went scientifically into the question of center of gravity. His testimony was neither shaken nor contradicted. It should be accepted by the Court. Parts of it are as follows:

> "Q. How long have you had the responsibility of designing this type of equipment?
>
> "A. Ever since the introduction of this kind of equipment was put on the highway." (R. 441)
>
> "Q. Is the location of the vertical center of gravity important?
>
> "A. It is very important in respect to the possibility of tipping it over on the highway or around curves." (R. 442)

The witness then proceeded through several pages of testimony to make a detailed calculation of the vertical center of gravity for car-carrying equipment of the type in controversy. This testimony will be found on pages R. 442, 443, 444, 445 and 446 on the last of which we find the conclusion:

> "Now after taking these moments and determining one common center of gravity for the combined three bodies, getting the location of the center of gravity for the combined units 47¼ inches from the rear

axle of the tractor and 50½ *inches above the ground.*" (Italics supplied)

The witness then proceeds to determine accurately the center of gravity of the same tractor used in the above illustration, but carrying an ordinary stake rack body and commercial load four feet high equal to the load of the automobiles used in the first illustration. After applying the formula in detail, we find the following conclusion on pages R. 449-450:

> "There are three distinct bodies on this print, the tractor chassis itself, it has one center of gravity, the stake rack body, which is another, and the pay load itself, which is another, three distinct bodies, which are transmitted by taking moments of vertical and horizontal axes to get one common point, transmitting these three centers to one common point brings the *center of gravity of the combination down to 50 7/8 inches from the ground level* and 28 7/8 inches in from the rear axle.
>
> "Q. Is 50 1/8 inches a general center of gravity or figure which would be comparable with the 50½ vertical center of gravity that you gave for the car carrier?
>
> "A. That is correct, having the same gross weight for both." (Italics supplied)

The fifteenth finding of the Chancellor (R. 483) could not have been made if consideration had been given to certain of appellants' requests. The first of these requested findings is that the vertical center of gravity of car-carrying equipment is approximately thirty-five per cent of the height. This is a matter of direct testimony by Mr. Francis and is not controverted in any way (R. 132). When this testimony is read, in connection with the testimony of Mr. Judd, who went into very great detail, and scientifically determined the vertical center of gravity of a typi-

cal car-carrying unit loaded, to be *fifty and one-half inches* from the ground, and a similar center of gravity of an ordinary truck carrying a cargo only four feet in height and having a light stake rack body which would lower the center of gravity was *fifty and seven-eighths inches* from the ground (R. 439-471, esp. 450), the error of the Court is apparent.

If the law governing the carrying of a car over the cab is to depend upon safety to justify it, certainly it ought to be shown that the equipment so covered is less safe than the ordinary equipment used every day on the highway. Vertical center of gravity is an important element in case.

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5. Removal of car over the cab or reconstruction or conversion of automobile transporting vehicles would make them unsafe in operation over the highways.

The testimony on this phase of the case will be found on the following pages: Mordan, R. 46, 50, 57, 58; Lawrence, R. 74; John G. Reeser, R. 85, 90; Maurer, R. 93, 99; Francis, R. 130, 148-150, 152, 153; Boutell, R. 172, 179-183; Tiffenbaugh, R. 196; Reeser, R. 199-201; King, R. 320; Judd, R. 452, 453.

This testimony shows that most accidents involving the equipment here in question occur not when there is a car over the cab, but while the car carriers are empty. The record is conclusive that to take the car off the cab, on the ordinary equipment built to carry four cars, would actually make the operation much less safe. This is caused by the fact that with a load only on the middle and rear of a carrier vehicle designed to carry four cars, the front wheels do not have sufficient weight upon them to afford proper traction in the front of the vehicle. The presence of the car over the cab balances the weight on the rear of the vehicle, and keeps the front wheels firmly on the high-

way. Some witnesses went so far as to testify that they would not drive a car carrier built to carry a car over the cab without having a car in that position, if there were also three others on the equipment. The defendants in no way undertook to deny that the equipment could be operated more safely with the car over the cab in violation of the law than it would be without the car over the cab in conformity with the law.

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6. The view of the highway, either of the driver or other highway users, is not affected by reason of a car being carried partly or wholly over the cab.

The cab supports and the roof of a cab of any motor vehicle do, to some extent, obstruct the vision of the driver. He could see better if he sat in the open. The actual construction and loading on a large part of the car-carrying equipment makes absolutely no change in this respect. The type of equipment where some effect might result from placing a part of the car over the cab is largely obsolete and no longer operated. It is shown in Defendants' Exhibit GG, R. 631, Models R-4, R4-T, R, RT, T, and TT. If all these models were ruled off the highway, it would ruin a few operators, but would not have a serious effect on the industry as a whole. The court included the models DL and LT, which is a very large proportion of all convoys, in the group which affected the vision of the driver. This is, of course, unbelievable.

As to obstructing the vision of other users of the highway, we find that other trucks may carry a load higher than the cars on a motor carrier and approximately 26 inches wider. The average car is about 70 inches wide, while the permissible truck or load width in Pennsylvania is 96 inches (1929 P. L. 905, Sections 902, 903, 75 PS 452, 453).

After all, the best proof as to how safely anything will operate is the actual experience with its operation. No one on either side of this case could testify that any interference with the vision of the operator, in all of the millions of miles traveled, had caused any accident or contributed thereto. This seems to be the best evidence of the safety of this particular type of equipment.

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7. Car-over-the-cab equipment is not driven on the left side of the highway any more than is other commercial equipment.

All trucks are sometimes driven to the center or left side of a highway to avoid overhead obstructions on the right side of the highway, and there is no evidence that a car over the cab causes that to be done more frequently than in the case of other trucks. There is direct testimony that the same operation would be required by the presence of a car of equal height behind the cab, which is not prohibited by law (R. 238), and that the car behind the cab is higher than the one over the cab in many cases. All overhead obstructions such as bridges, girders, or other structures where less than the maximum height for a truck is available, must be marked, and are marked, by the State Highway Department, but the Department of Highways allows the highways to become overgrown with trees or bushes hanging directly over the main paved portion of the highway, and giving a less clearance than the law permits (R. 238, 245, 251, 260, 262). This is no fault of the operators on the highway, and all complaints concerning it which are the result of any necessary driving on the left side of the road should be lodged against the Department of Highways, and not against the operator, who must travel this road after having paid the full license fee. The remedy is for the Department of Highways to eliminate these unnecessary and undesirable obstructions. However,

their seriousness is not at all in accord with what one might be led to believe. There is no legal objection to driving on the left of the center of the public highway when there are obstructions on the right side. It is done every day, thousands of times by operators of various types of motor vehicles. There is not the slightest testimony that any danger was caused or that there was anything unsafe in the operation of the trucks in question or that this was the cause of any accident. The court can take judicial notice of the fact that a driver of any other truck of the same height would operate in the same manner. We believe the chancellor placed considerable weight on this method of operation in concluding that car carriers were unsafe, whereas the testimony does not so indicate.

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8. Appellants cannot reroute their traffic around the Commonwealth of Pennsylvania.

Since it is so obviously impossible to route any highway traffic eastward in the United States, north of Pennsylvania because of Lake Erie, and since it is equally impossible to reroute traffic through Ohio and West Virginia which is destined for New York and New England, the act is especially oppressive.

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9. By enforcement of the act in question, many operators will be required to discontinue the operation of their vehicles (R. 40, 55, 57, 74, 81, 84, 85, 88, 94, 95, 98, 171); they will be required to discharge a large number of their employes (R. 106, 110, 95, 171); will be deprived of the reasonable enjoyment of their property (R. 40, 55, 56, 57, 68, 74, 81, 84, 85, 89) and will suffer immediate and irreparable damage.

As set forth in the prior portions of this brief, the record establishes that the appellants and intervenors can

not remodel their equipment to make it comply with the provisions of the act in question by removing the car from over the cab. Equipment which has been designed and built to haul a car over the cab cannot safely be operated without having a car in that position due to the loss of traction in the front wheels.

The testimony shows that the car carriers have equipment worth hundreds of thousands of dollars (R. 39, 84, 92, 171) which would, if the provisions of this act are upheld, be completely outlawed (R. 40, 171). They have built up their businesses over a period of years in full compliance with the laws of this and other states of the United States. The act in question would immediately prohibit the operation of any of the equipment here in question.

The Chancellor found that it is not pertinent to the ultimate conclusion, that all of the equipment of the appellants would be illegal under the law and that their business would thus be completely ruined. The Chancellor also indicated that the fact that such equipment is legal in New York, New Jersey, Maryland, Ohio and Delaware, being all of the surrounding states, has nothing to do with this case. We recognize the fact that if it were established that the operation of car-carrying equipment is a menace to the safety of the users of the highway, the fact that there is a substantial investment in this business, that a large number of companies would be bankrupt and their property completely destroyed by the enforcement of the act, and a large number of persons' livelihood lost, probably would have little effect. Safety justifies large sacrifices. However, in this case the evidence throughout shows that this particular type of equipment is the safest in use upon the public highways. Even if it were of only average safety, we should urge our position; but being the safest of equipment, certainly the general destructive effect of prohibiting its operation should be taken into account before any law, such as this, should be enforced or declared

constitutional. As we have said before, all safety is relative. There would be no accidents upon the highway whatsoever, insofar as automobiles are concerned if no automobiles were permitted to operate. We do not say this facetiously, but we say in utmost seriousness that the law has picked out the safest equipment on the highway and has prohibited it on the ground that it is not safe. The Chancellor and the Pennsylvania Supreme Court have adopted the position that such an act is constitutional regardless of its consequences to everybody else. Civilization carries with it certain responsibilities which cannot be eliminated. Among these is a certain degree of danger caused by proximity. This cannot be legislated out of the way.

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10. In view of all the evidence, it is clear that the matter of safety in no way entered into the enactment of this law.

A consideration of all the facts, exposes the discrimination and oppression resulting from this measure, which does nothing to eliminate the danger and abuses, if any, attendant upon the use of the highways of this commonwealth by the legitimate motorized business of transporting new automobiles from factory to dealer.

These facts and considerations compel the conclusion that the act in question oppresses, embarrasses, and restricts to the point of prohibition, existing motor convoys, which are not a menace upon the highways. Instead of making real provisions having definite relation and reasonable adaption to elimination of highway congestion and traffic hazards, the enactment does no such thing, but, under the guise of regulating, prohibits the use of almost all existing motor convoys, because of an immaterial peculiarity in their construction. It leaves the highway open to trucks hauling other merchandise, which may be a much greater menace. Such an immediate, uncompensated des-

truction of a legitimate business is beyond the power of the Legislature.

In closing this portion of our argument, it is appropriate to refer to a recent decision of the Pennsylvania Supreme Court on the precise point in which the court held invalid the so-called "Full Crew Law", which required the addition of another man to a train operating crew under certain circumstances and conditions: *Pennsylvania Railroad Company v. Dennis J. Driscoll, et al.*, Nos. 8 and 9, May Term, 1940 (not yet reported in official reports). Let us look at certain statements of the Supreme Court in that case. It discusses the supposed danger and the accidents which do happen, as follows:

> "The court below found that there was no real, present danger for the Act to correct, nor any potential danger so apparent, or probable, that would call for the expenditure by appellee of the large sums of money required by the Act, and that, in any event, the employment of additional man-power would not obviate or prevent the suppositional hazards. Generally speaking, the accidents reviewed were attributable to human frailties, under circumstances which additional men could, or would, not remedy."
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> * * * * * * *
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> "What impressed us most was the highly speculative possibility of the danger of accidents alleged to exist: The resultant effectiveness of the Act under these circumstances could only be out of all reasonable proportion to the cost involved * * *"

This is almost an exact statement of our own situation and we believe it would be helpful to bring to your attention the facts of record in relation thereto.

While we recognize the principle that findings of fact of a state supreme court will ordinarily be accepted, this court has frequently stated that it will review findings of

fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts: *Fiske v. State of Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108; *Aetna Life Insurance Company v. Dunken*, 266 U. S. 389, 45 S. Ct. 129, 69 L. Ed. 342; *Norris v. Ala.*, 294 U. S. 587; 55 S. Ct. 579, 79 L. Ed. 1074. In our discussion of the facts in the present record, insofar as they are pertinent to the principles set forth by the Pennsylvania Supreme Court in the Full Crew decision, we shall refer only to those facts of record of the type of which this court has indicated it will consider in an appeal of this nature.

"* * * there was no real, present danger for the Act to correct * * *"

We have already discussed evidence presented by the appellants indicating that the type of equipment outlawed by the Pennsylvania statute is the safest commercial equipment on the highways. National Safety Council statistics, the testimony of insurance carriers, the accident frequency record of the carriers, the insurance experience records, are persuasive evidence that no real present danger exists for the act to correct. The one and one-quarter accidents per year presented by the defendants merely corroborate the testimony of the plaintiffs on this feature.

"* * * nor any potential danger so apparent, or probable, that would call for the expenditure by appellee of the large sums of money required by the Act * * *"

The extensive investments in this business are not denied. Not only is the total large, but it involves practically all of the assets of many of those engaged in the business. For some, the enforcement of the statute would result in a forfeiture of their investment, resultant unemployment to their employes, and inconvenience to their patrons. The "expenditure" required by car carriers to replace their equipment in order to comply with the Pennsylvania law, being in many cases 100% of their present investment, would be proportionately much greater than the "expenditure" of the railroad referred to by the Supreme Court.

"* * * in any event, the employment of additional man-power would not obviate or prevent the suppositional hazards. Generally speaking, the accidents reviewed were attributable to human frailties, under circumstances which additional men could, or would, not remedy."

It is just as certain in this case that the prohibition of the Pennsylvania statute would not remove any real highway hazards. As indicated previously, there is no evidence that the presence of a car over the cab either caused or aggravated any accident.

"* * * What impressed us most was the highly speculative possibility of the danger of accidents alleged to exist."

It seems to us nothing could be more speculative than the possibility of accidents under the record in this case. There was no evidence of actual accidents caused by the presence of the car over the cab and the only evidence on that point was exactly contrary to this conclusion. The evidence relied upon to establish that this type of operation

is unsafe, therefore, is not based on actual accident experience but on pure speculation. Much of the speculation, moreover, is directly contrary to acknowledged laws of physics. An example of this is the conclusion of the court that the weight of the car over the cab tended to elevate the headlight beams of the tractors. Another example is the statement of the Supreme Court that the "detrimental effect upon balance, steering, braking, and vision remains the same" whether the weight of the vehicle is carried on the cab, on supports in front of the rear portion of the cab, or on a single point of contact back of the rear axle. In effect, the court states that the result on vision would be the same whether the car is entirely over the cab, resting on supports in front of the cab, or whether merely a bumper hangs over the back of the cab with no supports whatever on the cab or tractor unit. Such statements are contrary to the accepted laws of physics.

> "The resultant effectiveness of the Act under these circumstances could only be out of all reasonable proportion to the cost involved * * *"

This admirably summarizes the present situation and we submit that the Pennsylvania Court should have reached the same conclusion in the instant case.

IV.

THE INTERPRETATION OF THE 1939 AMENDMENT BY THE STATE COURT IS CLEARLY ERRONEOUS AND UNDER THE FACTS PRESENT HERE THE AMENDMENT SHOULD BE CONSTRUED BY THIS COURT

As indicated in the statement of the case, Section 1033 (c) as enacted in 1937, was amended by the Pennsylvania General Assembly in 1939 to read as follows:

"(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle [any part] *the weight* of which is *directly* above the cab of the carrier vehicle or *directly* over the head of the operator of such carrier vehicle." (Brackets indicate deletions; italics indicate insertions).

The section was amended after the appeal had been argued in the Pennsylvania Supreme Court but before the decision of that court was filed. Since no effective date was prescribed in the amendment, it did not become effective until September 1, 1939 (Pennsylvania Statutory Construction Act of May 28, 1937, P. L. 1019, Article 1, Section 4 (46 PS 504)) which was almost two months after the decision of the Pennsylvania Supreme Court was filed.

In its opinion, the Pennsylvania Supreme Court considered the amendment and concluded that it made "no essential change * * * in the prohibition of the statute. Whatever may have been the legislative purpose in promulgating the amendment, it has not modified the effect of this Section" (R. 693). Thus the Pennsylvania Supreme Court admittedly reached its conclusion without regard to the legislative purpose although it seems settled law that the fundamental principle in interpreting statutes is to construe the language thereof in order to ascertain the intention and purpose of the legislature and to give effect thereto. 59 C. J. 568.

This startling conclusion of the Pennsylvania court was reached without affording counsel an opportunity to be heard on the interpretation of the amendment.

It is obvious from even a casual glance at the 1939 amendment that the language and terms used therein are materially different from the language of the 1937 act, and that it is something more than merely a statute correcting typographical errors in the 1937 act. Since there is an

actual and evident change in the language in the 1939 act from the language of the 1937 act, there is a presumption raised that a departure from the old law was intended by the Pennsylvania Legislature when it passed the 1939 amendment. This general rule is clearly expressed in 25 R. C. L., 1051. There is abundant authority on this principle, some of the leading cases being *Louisville & Nashville Railroad v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 Law Ed. 297, and *Johnson v. U. S.*, 225 U. S. 405, 32 Sup. Ct. 748, 56 Law Ed. 1142. In *Louisville & Nashville Railroad v. Mottley (supra)* a question arose as to the wording of the original Interstate Commerce Act which forbade a carrier from charging a "Greater or less compensation" to one person than to another for the same service as compared to the wording of the amendatory act which said, "greater or less or different compensation." The United States Supreme Court held:

> "We cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or different' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them."

Similarly, in *Johnson v. U. S. (supra)*, it was said:

> "A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words, 'any lands reserved or acquired for the exclusive use of the United States', used in Section 272, would be regarded as the equivalent in meaning of the words 'district or country under the exclusive jurisdiction of the United States', used in Section 5339."

Accord: *Capone v. U. S.*, 51 Fed. Second 609; *Spring City. S. Co. v. Commissioner of Internal Revenue*, 292 U. S. 182. 78 Law Ed. 1200.

The rule was also well stated in *United States v. Bashaw*, 1 C. C. A. 653, 4 U. S. Appeals 360, 50 Fed. 754, wherein the Circuit Court of Appeals held:

> "The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."

The purpose and intent of the amendment is entirely clear to all those familiar with the situation. There are a number of types of car-over-cab units. These are indicated in graphic form in Exhibit 3-G (R. 532). In some of these, a complete car protrudes over the cab; at the other extreme there are types where only a bumper of one of the cars being transported protrudes over the cab. There are a number of types between these two extremes. The original section prohibited the operation when "any part" of a car was above the cab or over the head of the operator. The amendment removed the words "any part" and inserted the words "the weight" and "directly". The obvious intention was to prohibit such transportation only when "the weight" of the car was "directly" above the cab or "directly" over the head of the operator.

There are many cases where equipment, perfectly within the amended statutory language, would be prohibited this year (under the decision of the Pennsylvania Supreme Court) because the car bodies have been lengthened and the bumper (which in most cases is riveted on to the frame), or a small portion of the front of the car, protrudes over, but none of the weight rests on, the cab or on any supports located in front of the rear of the cab. We submit that it was the obvious intention of the legislature to permit the transportation of motor cars in all cases where the weight of the cars themselves was carried on the trailer and was transmitted to the tractor through the fifth

wheel even though a substantial part of these cars might overhang the cab.

The conclusion of the Pennsylvania Supreme Court regarding the effect of the amendment completely overrides the obvious intention of the legislature.

While we recognize that this court ordinarily accepts the state court's interpretation of a state statute, nevertheless there are certain features present here which justify a departure from this rule. The amendment was considered by the Pennsylvania Supreme Court without affording opportunity to the interested parties to be heard and this is therefore the first opportunity for the presentation of argument on that point. Secondly, a reading of the court's opinion indicates that it was not interpreting the wording and language of the amendment but was determining the effect thereof. Under such circumstances it has been held that the federal judiciary may refuse to abide by the decision of the state court. The principle is thus set forth in 40 L. R. A. (n. s.) 400 wherein it is stated:

> "Thus, in a number of cases the Federal Courts have refused to abide by decisions of the state courts, although the question involved, or at least was involved in, the state construction of statutes upon the ground that they were as to the effect rather than the construction, of the constitution or statute; and did not rest upon nor involve the particular language employed but proceeded upon general principles."

Since the decision of the Pennsylvania court does not present a clear case of statutory construction, this court is free to construe the amendment.

An analogous case to the instant one is that of *Town of Venice v. Murdock*, 92 U. S. 494, 23 L. Ed. 583 wherein was involved the question of the validity and enforceability of certain municipal bonds issued under authority of an

Act of the Local Legislature. The United States Supreme Court held the bonds to be valid in spite of a New York State Court decision to the contrary, the U. S. Supreme Court holding as follows:

> "It is argued, however, that the New York Decisions are judicial constructions of a statute of that State; and, therefore, that they furnish a rule by which we must be guided. The argument would have force if the decisions, in fact, presented a clear case of statutory construction; but they do not. They are not attempts at interpretation. * * * They assert this as a general proposition (that bona fide holder of the bonds must prove the requisite number of voters did actually assent to the issuance). They do not assert that the statute so declares, or that such is even its implied requisition. There is, therefore, before us no such case of the construction of a State statute by state courts as requires us to yield our own convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are."

In view of the circumstances present in this case, we respectfully submit that this court should make its own interpretation of the amendment. In doing so, we urge the court to construe the language as obviously intended, and that is to exempt from the prohibition all vehicles where the weight of a car does not rest on the cab or over the head of the operator nor on supports located in front of the rear line of the cab.

In any event there are federal questions presented in this record for decision by this court regardless of whether it feels constrained to follow the conclusion of the state court or makes it own construction and interpretation of the law in question. *Campbell v. California*, 200 U. S. 87, 26 S. Ct. 182, 50 L. Ed. 382; *Abie State Bank v. Weaver*, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690; *Fidelity & Deposit*

Co. of Md. v. Tafoya, 270 U. S. 426, 46 S. Ct. 331, 70 L. Ed. 664; *Missouri ex rel. Wabash Ry. Co. v. Mo. P. S. C.*, 273 U. S. 126, 47 S. Ct. 311, 71 L. Ed. 575; *Dorchy v. Kansas*, 264 U. S. 286, 44 S. Ct. 323, 68 L. Ed. 686; *Patterson v. Alabama*, 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082.

Respectfully submitted,

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